UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROGER G. GALBRAITH, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	Civil Case No. 01-cv-4012-JPG

MEMORANDUM AND ORDER

This matter comes before the Court on petitioner Roger G. Galbraith's ("Galbraith") motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 (Doc. 1). The Government responded to the motion (Doc. 6), and Galbraith replied to the response (Doc. 8).

I. Background

Galbraith was indicted on one count of conspiracy to distribute and possess with intent to distribute a substance containing methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846 (count 1) and on one count of conspiracy to manufacture methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846 (count 2). In the pre-trial phase of his case, Galbraith filed a motion to suppress evidence seized from his home and a nearby shed and statements he made allegedly without being given *Miranda* warnings. The Court held a hearing at which Galbraith testified and denied the motion.

During jury selection, Galbraith entered into an open plea to both counts. In the plea colloquy, the Court did not advise Galbraith that by his unconditional plea he was waiving the right to appeal the Court's denial of his motion to suppress. Galbraith came before the Court for sentencing on March 3, 1999. At that hearing, Galbraith did not object to the Court's finding that he had obstructed justice by testifying falsely at the suppression hearing. The Court

declined to reduced Galbraith's offense level for acceptance of responsibility by virtue of his eleventh-hour plea and sentenced him to serve 151 months in prison, the low end of the guideline range.

Represented by different counsel, Galbraith appealed his conviction, raising the following issues he claimed were error: (1) the Court's denial of his motion to suppress, (2) the Court's reliance on certain evidence to calculate amounts of methamphetamine for which he was held accountable, (3) the Court's enhancement of his sentence based on obstruction of justice, (4) the Court's denial of an offense level reduction based on acceptance of responsibility, and (5) the Court's finding that the safety valve provision of the sentencing guidelines did not apply to him. In an appellate brief, Galbraith conceded that he had pled guilty unconditionally and urged the Court of Appeals to depart from its rule of "ordinarily" finding that such a plea waived all antecedent nonjurisdictional issues such as motion to suppress rulings. The United States Court of Appeals for the Seventh Circuit found that Galbraith had waived the suppression issue by his unconditional plea. It affirmed the conviction and sentence on January 11, 2000. Galbraith filed this motion on January 9, 2001.

II. § 2255 Standard

The Court must grant a § 2255 motion when a defendant's "sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255. However, "[h]abeas corpus relief under 28 U.S.C. § 2255 is reserved for extraordinary situations." *Prewitt v. United States*, 83 F.3d 812, 816 (7th Cir. 1996). "Relief under § 2255 is available only for errors of constitutional or jurisdictional magnitude, or where the error represents a fundamental defect which inherently results in a complete miscarriage of justice." *Kelly v. United States*, 29 F.3d 1107, 1112 (7th Cir. 1994) (quotations omitted). It is proper to deny a § 2255 motion

without an evidentiary hearing if "the motion and the files and records of the case conclusively demonstrate that the prisoner is entitled to no relief. " 28 U.S.C. § 2255.

A § 2255 motion does not substitute for a direct appeal. A defendant cannot raise in a § 2255 motion a constitutional issue that he could have but did not raise in a direct appeal unless he shows good cause for and actual prejudice from his failure to raise it on appeal or unless failure to consider the claim would result in a fundamental miscarriage of justice. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977); *Fountain v. United States*, 211 F.3d 429, 433 (7th Cir. 2000); *Prewitt*, 83 F.3d at 816. A defendant cannot raise in a § 2255 motion nonconstitutional issues that he failed to raise on direct appeal regardless of cause and prejudice. *Lanier v. United States*, 220 F.3d 833, 842 (7th Cir.), *cert. denied*, 531 U.S. 930 (2000).

III. Galbraith's Petition

Galbraith raises three basic arguments in his § 2255 motion: (1) that his guilty plea was not knowing and voluntary because he was not aware of the elements of the offense or the direct consequences of his plea and because his counsel rendered him ineffective assistance in connection with his plea, (2) that his counsel rendered him ineffective assistance of counsel in connection with his sentencing and (3) that the statutes under which he was convicted are unconstitutional. The Court will start by addressing the aspects of Galbraith's first argument that relate to his alleged lack of awareness of the consequences of his unconditional guilty plea.

A. Plea: Waiver of Appeal of Suppression Issue

Galbraith argues that his plea involved violations of the Fifth and Sixth Amendments. He claims that the plea was not knowing and voluntary because he was not aware that his unconditional guilty plea would waive his right to appeal the denial of his motion to suppress and, the flip-side of that same argument, that his trial counsel rendered him ineffective assistance

of counsel by failing to inform him that his unconditional plea would waive the suppression issue on appeal.

The Government argues that Galbraith waived these arguments by failing to raise them on direct appeal. Alternatively, the Government points to the plea colloquy and the Court's finding that the plea was voluntary and knowing to show that the plea was valid. The Government also notes the lack of any proof of counsel error or resulting prejudice.

1. Procedural Default

The Court finds that Galbraith has procedurally defaulted these arguments by failing to raise them on direct appeal. However, the Court will consider the arguments anyway because a failure to do so would work a fundamental miscarriage of justice. The failure to hear claims for ineffective assistance of counsel on collateral review is generally considered to work a fundamental miscarriage of justice because often such claims can be heard in no other forum. They are rarely appropriate for direct review since they often turn on events not contained in the record of a criminal proceeding. *Fountain v. United States*, 211 F.3d 429, 433-34 (7th Cir. 2000); *United States v. D'Iguillont*, 979 F.2d 612, 614-15 (7th Cir. 1992). Likewise, arguments that rely on a defendant's knowledge and thought process leading up to the decision to enter an unconditional guilty plea – at least where that knowledge and thought process is not reflected in the record – are not appropriate for direct review and should be saved for collateral review.

The record of Galbraith's criminal proceeding does not reflect his knowledge that he was waiving the right to appeal the denial of his motion to suppress when he pled. It also does not reflect his counsel's advice to him in preparation for the plea. Thus, Galbraith could not have raised those issues on direct appeal. For this reason, the Court finds that failure to consider those arguments in the instant motion would work a fundamental miscarriage of justice. Accordingly,

the Court will now consider the merits of those claims.

2. Merits

The Court finds that Galbraith has not met his burden regarding the involuntariness of his plea. *Marx v. United States*, 930 F.2d 1246, 1250 (7th Cir. 1991). A guilty plea is valid only if it is made voluntarily, knowingly and intelligently. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). The plea must represent "a voluntary and intelligent choice among the alternative courses of action open to the defendant," *North Carolina v. Alford*, 400 U.S. 25, 31 (1970), and the defendant must have a "sufficient awareness of the relevant circumstances and likely consequences," *Brady v. United States*, 397 U.S. 742, 748 (1970). A plea that is not made voluntarily, knowingly and intelligently violates the Due Process Clause of the Fifth Amendment. *United States v. Gilliam*, 255 F.3d 428, 433 (7th Cir. 2001) (citing *McCarthy v. United States*, 394 U.S. 459, 466 (1969)). A petitioner challenging the voluntariness of his plea bears the burden of persuading the Court that his plea was not voluntary, and the Court should look to all the facts and circumstances surrounding the plea to determine whether it was voluntary. *Marx*, 930 F.2d at 1250.

Galbraith alleges that his plea was involuntary because of events not contained within the record of his criminal case, namely, his counsel's failure to advise him of the consequences of his plea and his resulting misunderstanding about those consequences. There is no question that the four corners of the record reflect an unquestionably knowing and voluntary plea. However, the facial validity of a plea as reflected in a plea hearing does not foreclose the possibility that it was not voluntary because of some factor not reflected in the proceedings. *Blackledge v. Allison*, 431 U.S. 63, 74-75 (1977); *Bontkowski v. United States*, 850 F.2d 306, 316 (7th Cir. 1988); *Evans v. Meyer*, 742 F.2d 371, 382 n. 9 (7th Cir. 1984). "In administering . . . § 2255 . .

., the federal courts cannot fairly adopt a *per se* rule excluding all possibility that a defendant's representations at the time of his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment." *Blackledge*, 431 U.S. at 75. The petitioner must, however, present in his petition allegations regarding the matters outside the record that are not "palpably incredible" or "patently frivolous or false" when viewed in light of the record as a whole. *Blackledge*, 431 U.S. at 76. In the absence of credible allegations of matters outside the record, the petition is subject to summary dismissal without a hearing. *See id.*

Faulty legal advice that leads to a petitioner's misunderstanding of the direct consequences of his plea is one of those factors that could render a plea involuntary and thus invalid. *See Dickerson v. Vaughn*, 90 F.3d 87, 92 (3d Cir. 1996) (§ 2254; counsel's affirmative misrepresentation that double jeopardy issue was appealable after *nolo contendere* plea was constitutionally ineffective). The Supreme Court has long recognized that a plea can only be voluntary if counsel provided competent assistance in connection with the plea. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). A party claiming ineffective assistance of counsel bears the burden of showing (1) that his trial counsel's performance fell below objective standards for reasonably effective representation and (2) that this deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 688-94 (1984); *Fountain v. United States*, 211 F.3d 429, 434 (7th Cir. 2000). The plaintiff's burden is heavy because the *Strickland* test is "highly deferential to counsel, presuming reasonable judgment and declining to second guess strategic choices." *United States v. Shukri*, 207 F.3d 412, 418 (7th Cir. 2000) (quotations omitted).

To satisfy the first prong of the *Strickland* test, the plaintiff must direct the Court to specific acts or omissions of his counsel. *Fountain*, 211 F.3d at 434 (citing *United States v.*

Trevino, 60 F.3d 333, 338 (7th Cir. 1995)). The Court must then consider whether in light of all of the circumstances counsel's performance was outside the range of professionally competent assistance. *Id.* Counsel's performance must be evaluated keeping in mind that an attorney's trial strategies are a matter of professional judgment and often turn on facts not contained in the trial record. *Id.* The Court cannot become a "Monday morning quarterback." *Harris v. Reed*, 894 F.2d 871, 877 (7th Cir. 1990). To satisfy the second prong of the *Strickland* test, the plaintiff must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Fountain*, 211 F.3d at 434.

In a case where a petitioner pled guilty as a result of alleged ineffective assistance of counsel, to satisfy the first prong of the *Strickland* test, the petitioner must show that his counsel's advice leading to the plea was outside the range of professionally competent assistance. *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985) (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973)). To satisfy the second *Strickland* prong, he must show that there is a reasonable probability that, but for his counsel's deficient performance, he would not have entered a guilty plea and instead would have gone to trial. *Hill*, 474 U.S. at 58. To make such a showing, the petitioner must present objective evidence that he would not have entered a guilty plea; his own self-serving testimony is not enough. *McCleese v. United States*, 75 F.3d 1174, 1179 (7th Cir. 1996) (citing *Toro v. Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991)).

Galbraith has not made the required showing of a Fifth or Sixth Amendment violation in connection with his plea. He has not pointed to any objective evidence that he would not have pled guilty had his counsel advised him correctly that his plea was waiving his right to appeal the suppression issue. An affidavit from his attorney regarding their discussions leading to the plea

perhaps would have constituted such objective evidence. He has also not made any credible allegation that in pleading he relied on a belief that he would be able to appeal the suppression issue. Instead, Galbraith presents only his own self-serving statement that he did not know that he would not be able to appeal the suppression issue and that he would not have pled guilty if he had known that. It appears to the Court equally, if not more, likely that Galbraith pled on the morning of trial in an effort to avoid the ordeal of a trial and to obtain an offense level reduction for acceptance of responsibility without even giving a thought to appealing the suppression issue. It is also equally, if not more, likely that Galbraith then changed his mind about his plea when the Court declined to grant a reduction for acceptance of responsibility and exposed Galbraith to the same punishment as he would have faced had he been found guilty by a jury. The Court clearly recalls Galbraith's demeanor at his plea hearing which suggested that he was solely concerned with avoiding trial and not in the least concerned with preserving pretrial rulings for appeal. The record also reflects that Galbraith did not once mention the possibility of any appeal of his motion to suppress and that he failed to object to the Court's finding at sentencing that he had lied in his testimony at the suppression hearing. The Court believes that this reveals a total lack of concern during and after his plea for the suppression motion and exposes Galbraith's current complaints for what they are – a collection of palpably incredible allegations marshaled in a last-ditch try for a lesser sentence. If Galbraith truly believed at any time that he would be allowed to appeal the suppression issue, it would have been of paramount importance to at least object to the Court's perjury finding. In sum, the Court finds that Galbraith has made no credible allegations that his plea was somehow involuntary because he relied on being able to appeal the suppression issue and that Galbraith has pointed to no objective evidence that had he known he would not be able to appeal the suppression issue he

would not have pled guilty. Thus, he has failed to meet his burden of showing that his plea was involuntary, and the Court rejects those grounds for his § 2255 motion.

B. Plea: Awareness of Elements of Offense

Galbraith argues that his plea was not knowing and voluntary because he was not aware that the Government would have to prove as an element of the offense the amount of drugs for which Galbraith would be accountable. He cites *Apprendi v. New Jersey*, 530 U.S. 466 (2000), for the proposition that the Government must charge and prove beyond a reasonable doubt drug quantities as an element of a drug conspiracy. *Apprendi* held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Galbraith admits that he was not subject to greater penalty than that provided by statute for a conspiracy involving only a trace amount of methamphetamine. In fact, even the upper limit of his guideline sentencing range did not exceed the statutory maximum.

1. Procedural Default

Galbraith failed to raise this issue on direct appeal and has therefore procedurally defaulted the issue. He certainly could have raised the issue on appeal, for the principles announced in *Apprendi* have been advanced, albeit unsuccessfully, for years prior to Galbraith's trial and sentencing. *United States v. Smith* 241 F.3d 546, 549 (7th Cir. 2001) (citing *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)). Because Galbraith has not demonstrated cause for or prejudice from his procedural default or and has not shown that failure to consider the issue now would amount to a fundamental miscarriage of justice, the Court cannot consider the issue in this § 2255 motion.

2. Merits

Even if the Court could consider the argument in this motion, it would reject it. The record clearly reflects that Galbraith was aware that if he went to trial the Government would have to prove to a jury beyond a reasonable doubt that he conspired to distribute and possess with intent to distribute methamphetamine (count 1) and that he conspired to manufacture methamphetamine (count 2). The record also clearly shows that the Court informed Galbraith that the maximum penalty to which he was exposed for a conspiracy involving even a trace amount of methamphetamine was 240 months. 21 U.S.C. § 841(b)(1)(C). In essence, before pleading, Galbraith was aware that the Government would have to prove to the jury beyond a reasonable doubt all the facts necessary to support a sentence of up to 240 months even after *Apprendi* – that his conspiracy involved some methamphetamine. Galbraith's self-serving allegation that he would not have pled had he been aware of just that – that the Government would have to prove to a jury beyond a reasonable doubt that his conspiracy involved some methamphetamine – is patently false and will not support a claim that his plea was involuntary. For this reason, the Court rejects this argument as a basis for § 2255 relief.

C. Ineffective Assistance of Counsel at Sentencing and Constitutionality of §§ 841 and 846

The Court addresses Galbraith's final two grounds for § 2255 relief together. Galbraith argues that his trial counsel was ineffective at sentencing because he failed to object to the obstruction of justice enhancement and that 21 U.S.C. §§ 841 and 846 are unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Galbraith has procedurally defaulted on his ineffective assistance of counsel claim by failing to raise it on direct appeal. He has also failed to show cause for and prejudice from the

failure to raise the issue on appeal or that a fundamental miscarriage of justice will result if the Court does not consider the issue in this § 2255 motion. As the Court noted earlier in this order, in many cases the failure to hear claims for ineffective assistance of counsel on collateral review is considered to work a fundamental miscarriage of justice. *Fountain v. United States*, 211 F.3d 429, 433-34 (7th Cir. 2000); *United States v. D'Iguillont*, 979 F.2d 612, 614-15 (7th Cir. 1992). That is not true, however, where the counsel's objectionable conduct is contained completely within the record and the petitioner was represented by different counsel on appeal. *McCleese v. United States*, 75 F.3d 1174, 1178 (7th Cir. 1996). The conduct of Galbraith's counsel to which he objects is clearly and completely reflected in the record of the sentencing hearing; no part of his argument turns on events out of the presence of the Court. Galbraith had different counsel on appeal who should have raised these ineffective assistance of counsel arguments at that time.

Similarly, Galbraith could have and should have challenged the constitutionality of §§ 841 and 846 on direct appeal. In the absence of any attempt to show cause and prejudice or that the Court's failure to consider the issue now would amount to a fundamental miscarriage of justice, the Court cannot examine the issue in this motion.

IV. Conclusion

For the foregoing reasons, the Court hereby **DENIES** Galbraith's motion (Doc. 1), **DISMISSES** this case with prejudice and **DIRECTS** the Clerk of Court to enter judgment accordingly.

IT IS SO ORDERED.
DATED: November ____, 2001

J. PHIL GILBERT
DISTRICT JUDGE